Nos. 80-315, 80-392
IN THE

Supreme Court of the United States

October Term, 1980

SOUTH PACIFIC COMPANY,

Petitioner,

vs.

CLARK B. RICHINS, BERNIE L. STARK, RALPH G. VICTOR, PAUL BENNETT, EARL F. DUSTIN, MIKE CLEM MERRILL, and STEVEN R. HYMUS,

Respondents.

BROTHERHOOD OF RAILWAY CARMEN OF THE UNITED STATES AND CANADA; SYSTEM FEDERATION NO. 114, RAILWAY EMPLOYEES' DEPARTMENT, AFL-CIO; LODGE #635,

Petitioners,

vs.

CLARK B. RICHINS, BERNIE L. STARK, RALPH G. VICTOR, PAUL BENNETT, EARL F. DUSTIN, MIKE CLEM MERRILL, and STEVEN R. HYMUS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

RESPONDENTS' BRIEF IN OPPOSITION.

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respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the Tenth Circuit's opinion in this case. That opinion is reported at 620 F.2d 761.

Since the submission of these Petitions by Respondents here, the National Railroad Adjustment Board (Second Division) over objections by Respondents, as entered in Order and Opinion, Docket No. 8220-I, Award No. 8496, which is attached hereto as Appendix "A".

Reasons Why Writ Should Be Denied.

1. The Decision Below Is Not in Conflict With the Decisions of This Court.

In *Andrews v. Louisville and Nashville Railroad Co.*, 406 U.S. 320 (1972) and *Union Pacific Railroad Co. v. Sheehan*, 439 U.S. 89 (1978), this Court forcefully and clearly established that "minor" disputes under the Railway Labor Act should in general be resolved through the mechanisms established by collective bargaining agreements and by statute, and not by the Federal courts. But while of great significance in the context of the Railway Labor Act, these decisions merely brought Railway Labor Act practice into congruence with the practice under the Labor-Management Relations Act, 29 U.S.C. §141, *et seq.* ("LMRA"). Ever since the famous Steelworkers trilogy,[1] it has been well established that the proper form for the interpretation and application of collective bargaining agreements is in the grievance and arbitration machinery set up by those agreements. Now, since *Andrews* and *Sheehan*, that is also true under the Railway Labor Act. The only remaining distinction is that under the Railway Labor Act the establishment

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[1]The trilogy decisions are *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564 (1960), *United Steelworkers of America v. Warrior and Gulf Navigation Company*, 363 U.S. 574 (1960), and *United Steelworkers of America v. Enterprise Wheel and Car Corporation*, 363 U.S. 563 (1960).

of a grievance and arbitration mechanism is voluntary while under the Railway Labor Act, the National Railroad Adjustment Board is established by statute to resolve "minor" disputes. 45 U.S.C. §153.[2]

Despite the exclusivity in general of the arbitration tribunal under the LMRA, it is also well established that when a union has breached its duty of fair representations, the courts may have jurisdiction over both the claim against the union *and* the claim against the employer. *Cf. Vaca v. Sipes*, 386 U.S. 171 (19); *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (19).

The decision of the Tenth Circuit in this case merely parallels the approach described in *Vaca* and *Hines* with regard to fair representation cases. The Tenth Circuit correctly pointed out that the exclusivity of the jurisdiction of the National Railroad Adjustment Board, as clearly stated in *Andrews* and *Sheehan*, must be reconciled with the equally important considerations forcefully stated by this Court in *Czosek v. O'Mara*, 397 U.S. 25 and *Glover v. St. Louis-San Francisco Railway Company*, 393 U.S. 324. The approach of the Tenth Circuit in reconciling *Andrews-Sheehan* and *Czosek-Glover*, merely establishes a procedure which is firmly entrenched in LMRA cases, *i.e.*, when there is an allegation of a breach of the duty of fair representation, a federal court may have jurisdiction over claims against both the union and the employer. There is nothing new or startling about this. It is the only possible reconciliation of the principle that contract questions be resolved by expert administrative bodies, and the principle that those bodies do not have jurisdiction over claims against unions by union members. To bifurcate the remedy, especially when there

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[2]*Cf.* also 45 U.S.C. §184 which requires that carriers by air and labor representatives establish arbitration panels.

is an allegation that the collective bargaining representative has abandoned the employee, would be in fact to deny any remedy to the employee.

Thus, this Court's decision in *Andrews* and *Sheehan* does not conflict with the decision of the Tenth Circuit. In fact, the decision below is an essential corollary of those decisions.

2. The Conflict in the Circuits Is Greatly Exaggerated or Non-Existent.

Defendants rely heavily on the case of *Goclowski v. Penn Central Transportation Company*, 471 F.2d 747 (3rd Cir. 1977) and point to that case as being in conflict with the Tenth Circuit's decision here. While there is some conflict in the dicta in the *Goclowski* opinion, it is important to note that in that case there was absolutely no allegation that the union's breach of duty of fair representation barred access to the NRAB. Plaintiffs in that case did not contend that they were not able to bring their claims to the NRAB; on the contrary, they appeared to have merely elected to go to the court rather than to the NRAB. The reason for this choice by Plaintiffs in *Goclowski* might have been the fact that the essence of their claim was an attack on the formation of the collective bargaining agreement. The correctness of that choice of forums was validated by the decision of the Third Circuit in that case which held that the NRAB did not have jurisdiction over the formation question. 571 F.2d 756.

Respondents point to no other conflicts in the Circuits in cases involving fair representation claims. This is hardly the kind of ambiguity in Circuit Court decisons which requires clarification by the Supreme Court at this time.

3. The Decision of the National Railroad Adjustment Board Confirms the Correctness of the Tenth Circuit's Decision.

Respondents allege in their complaint filed in the District Court that they had been demoted and furloughed in violation of a Memorandum of Agreement between the carrier and union and that these demotions and furloughs occurred on separate occasions in 1972, 1973, 1974 and 1975.

The collective bargaining agreement between the union and carrier requires that grievances be filed by employees within 60 days of the date of the incident grieved. Respondents alleged that they did not file a grievance with regard to the demotions and furloughs because the union had intentionally withheld from them the knowledge of the pertinent Memorandum of Agreement and that any grievance would clearly be untimely.

In 1975, Respondent Clark Richins discovered the existence of the Memorandum of Agreement and immediately filed a timely grievance as to his 1975 demotion and furlough. The other Respondents did not learn of the existence of the Memorandum of Agreement until at least 60 days after the last demotion and furlough.

After the decision of the District Court below, Respondents attempted to submit the matter to the NRAB in order to protect all possible legal remedies. However, after the entry of the Tenth Circuit's decision, the Respondents attempted to withdraw that submission. That body, however, entered a determination on November 19, 1980, holding that because Respondents Stark, Victor, Bennett, Dustin, Merrill and Hymus had joined Richins' claim, the NRAB lacked jurisdiction to consider all of the claims and was barred from rendering an award other than a dismissal. Of course, none of these individuals were able to submit a claim below because they only found out that they had rights under the collective bargaining agreement after the time

limits for the submission of a grievance had expired. Richins himself could not grieve several other furloughs that occurred before the furlough which was the subject of his claim which was later considered by the NRAB. Thus, the NRAB confirmed that after the time limits had expired and grievances could no longer have been submitted through the grievance and arbitration procedure below, it would not consider the claim later. Thus, unless a form existed for the resolution of this dispute, Respondents would be left without a remedy precisely because of the breach of duty of fair representation by the union.

Finally, the decision of the NRAB appears to recognize the validity of the contractual claims of Respondents. After stating that it had no jurisdiction to determine the issue, the NRAB gratuitously offered its opinion resolving Richins' claim on factual grounds, therefore implicitly accepting Respondents' contentions with regard to their rights under the Memorandum of Agreement and other applicable provisions of the collective bargaining agreement.

Conclusion.

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

JAY D. ROTH,
ROBERT A. BUSH,
Attorneys for Respondents.

Of Counsel:

TAYLOR & ROTH,
A Law Corporation,
By ROBERT A. BUSH

APPENDIX A.

Order.

Form 2(a).

National Railroad Adjustment Board, Second Division.

To accompany Award No. 8496, Docket No. 8220-I.

Mr. Robert A. Bush, Attorney, Taylor, Roth & Grant, 619 South Bonnie Brae Street, Los Angeles, California 90057.

The Division, after consideration of the Docket identified above, hereby orders that an award favorable to the petitioner should not be made. The claim is dismissed as set forth in the Award, a copy of which is attached and made a part of this Order.

Executive Secretary, National Railroad Adjustment Board, By Order of Second Division.

By/s/Rosemarie Brasch, Administrative Assistant.

Mr. L. M. Fox, Asst. Vice Pres., Labor Relations, Southern Pacific Trans. Co., One Market Plaza, San Francisco, California 94105.

Mr. O. W. Jacobson, Gen. Pres., BRCofUS&C, Carmen's Building, 4929 Main Street, Kansas City, Missouri 64112.

APPENDIX B.

Award.

Form 1.

National Railroad Adjustment Board, Second Division.

Award No. 8496, Docket No. 8220-I, 2-SPT-I-'80.

The Second Division consisted of the regular members and in addition Referee George E. Larney when award was rendered.

Parties to Dispute: Clark B. Richins, Bernie L. Stark, Ralph G. Victor, Paul Bennett, Earl F. Dustin, Mike Clem Merrill, Steven R. Hymus; Southern Pacific Transportation Company.

Dispute: Claim of Employees: This is an action brought by six (6) employees and former employees of the Southern Pacific Transportation Company (Pacific Lines) (hereinafter the "Company") who were members of the Brotherhood Railway Carmen of the United States of America, Systems Federation #114 of that Brotherhood, and Local 635 of the Brotherhood (hereinafter collectively referred to as the "Union"). Plaintiffs allege that they were demoted and then laid off in violation of the Collective Bargaining Agreement, specifically a 1965 Memorandum of Agreement which governed the relative seniority of employees classified as Apprentices and upgraded Apprentices and those employees classified as Helpers and upgraded Helpers.

Plaintiffs were first employed by the Company at various times during the year 1971 as Carmen Apprentices. Subsequently, they were all promoted to the job classification of upgraded Carmen Apprentice. Periodically from 1972 to the present they were demoted and furloughed before those employees with the job classification of upgraded Helper and Helper. Both upgraded Helpers and upgraded Apprentices perform the work of Journeymen Carmen while they

are in an upgraded status. After 1,040 days of indentureship, Apprentices obtain the job classification of Journeymen Carmen; Helpers can only count days toward obtaining a Journeymen Carmen date when they are working in an upgraded status. According to a 1965 Memorandum of Agreement between the Company and the Union, Upgraded Helpers should be demoted before Upgraded Apprentices are demoted. This was not the procedure followed by the Company and as a result of this breach of the Agreement, Plaintiffs were demoted and later furloughed and Helpers, who continued to work in an upgraded status, continued to accumulate credit toward their Carmen's date. None of the Plaintiffs were aware of the 1965 Memorandum of Agreement until after the last layoff in 1975. Throughout the period of time in question, Plaintiffs were told by Mr. Joyce Humphreys, Chairman of Local 635 of the Union, that the demotion and layoffs of the Apprentices ahead of the Helpers was the correct application of all Agreements then in effect. In response to inquiries about the furloughs by the Plaintiffs, Humphreys, and other Local Union officials, stated that the Helpers were protected and that any previous Agreements were superceded by the 1968 Reorganization Agreement.

The 1968 Reorganization Agreement governed certain of the terms and conditions of the merger of the Ogden Union Railroad & Depot Company (''OUR & D'') and the Southern Pacific (''SP''). The 1968 Agreement essentially merged the seniority rosters of the OUR & D and the SP and labelled all those who were employed by either Company before March 1, 1968 ''protected employees''. As ''protected employees'', they could only be furloughed as defined in that Agreement, at which time they would be compensated during the time of the furlough. The 1968 Agreement in no way modified the terms of the 1965 Mem-

orandum of Agreement and all members of the Union's Joint Protective Board, including General Chairman Harrold Carroll agree that the 1965 Memorandum of Agreement continued in effect after the 1968 Reorganization Agreement.

Finally, in early 1975, Mr. Clark Richins, one of the Plaintiffs, was told by Mr. Claire Toone, a former General Vice President of the Brotherhood, of the continued existence and viability of the 1965 Memorandum. At that time, Richins filed a grievance and pursued appeals through the International Union structure. The grievance was initially denied by the Company and the Union, through Harrold Carroll, who refused to process it any further, asserting that all Helpers had obtained a Carman's date by the time of the last layoff of Mr. Richins and therefore, since there were no more Helpers without Carmen's dates, the 1965 Memorandum of Agreement was of no relevance. The testimony of the Union officials, and the documents produced to date, demonstrate decisively that this was in fact not true and that the responsible Union officials were at least grossly negligent in not adequately investigating the matter and pursuing it.

On or about April 25, 1977, claimants here filed a lawsuit in the United States District Court for the District of Utah, Northern Division (Case No. 77-0038), alleging breach of the collective bargaining agreement by Defendant Railroad and breach of the duty of fair representation on the part of Defendant Union. Extensive discovery was taken on the part of both parties and much of that has been made part of the initial submission.

On September 6, 1978, the District Court Judge granted Defendants' motion for summary judgment, largely on the ground of the failure of Plaintiffs to bring the action before the National Railroad Adjustment Board. That ruling by the

District Court Judge is presently on appeal to the Tenth Circuit Court of Appeals.

Findings: The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

Based upon a thorough review and analysis of the voluminous record before us, this Board has arrived at the following determinations:

1. The case as presented before us is so procedurally flawed as to cause us to dismiss the claim(s) without a consideration of the merits.
2. In conjunction with point 1 above, we note the claim now before us is at variance with the original claim initiated by Carman Clark Richins and handled on the local property. This variance arises as a result of Claimant Richins' attorney having amended the original claim while being progressed on appeal to the Board, by adding a number of other claimants identified as employees and former employees of the Carrier.

   It is well established principle on all Divisions of the National Railroad Adjustment Board that interjection of new evidence and argument, including the unilateral addition of any number of claimants to cases upon their appeal to the Board, causes the claim to be at

substantial variance from that which was handled on the property and clearly in violation of the Railway Labor Act as well as our Tribunal's own Circular No. 1. See for example, Third Division Awards, 11904, 13235, 13333, 13561, 14747, and 14854.

Thus, the Board lacks jurisdiction to consider these claims and is therefore barred from rendering an Award other than dismissal.

3. Finally, we feel compelled however to state for the record that were it possible for us to consider the merits of this claim, we would still move to dismiss the case based upon the evidence of record which reflects that Mr. Don R. Ward established seniority as a Carman on date of May 19, 1973. This fact, in and of itself is, we feel, dispositive of the entire issue in the original claim and therefore we conclude no contract violation obtained.

For all the foregoing reasons, we find the claim(s) improperly before us and also without merit.

AWARD.

Claim dismissed.

National Railroad Adjustment Board, By Order of Second Division

Attest: Executive Secretary, National Railroad Adjustment Board

By/s/Rosemarie Brasch — Administrative Assistant.

Dated at Chicago, Illinois, this 19th day of November, 1980.